No. 97-54 JUL 7 1997

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In The

Supreme Court of the United States

October Term, 1996

WILLIAM H. HUDGINS,

Petitioner,

vs.

JESSE BROWN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit has violated Article 1, § 1 of the Constitution by rewriting 38 U.S.C. § 5121, the Accrued Benefits statute, to include a requirement that an accrued benefits claimant file a separate claim notwithstanding the existence of a pending appeal at the time of the veteran's death, by summarily affirming the decision of the Court of Veteran's Appeals prohibiting substitution of the accrued benefits claimant as appellant and dismissing the appeal.

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Petitioner, Mrs. Leila Hudgins, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is *Hudgins v. Brown*, No. 96-7025 (Fed. Cir., April 7, 1997) and reprinted in the Appendix ("Pet. App.") at 1a. The opinion of the Court of Veterans Appeals (hereinafter "CVA") in *Hudgins v. Brown* is published at 8 Vet. App. 365 (1995) (per curiam order) and reprinted at Pet. App. 7a. The opinion of the Court of Appeals for the Federal Circuit in the consolidated cases of *Zevalkink* and *Hesse v. Brown*, of which this case was stayed pending decision on and summarily dismissed based upon the decision in, is published at 102 F.3d 1236 (Fed. Cir. 1996) and reprinted at Pet. App. 16a.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Federal Circuit was entered on April 7, 1997.

PROVISIONS INVOLVED

Article 1, section 1 of the Constitution provides that: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Section 5121 of Title 38 states, in pertinent part that:

> Payment of certain accrued benefits upon death of a beneficiary.

> (a) . . . periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death (thereafter in this section and section 5122 of this title referred to as "accrued benefits") and due and unpaid for a period not to exceed two years, shall, upon the death of such individual be paid as follows: . . . (2) Upon the death of a veteran, to the living person first listed below: (A) The veteran's spouse; (B) The veteran's children (in equal share); (C) The veteran's dependent parents (in equal shares). . . .

Department of Veterans Affairs Regulation 38 C.F.R. § 20.1302 (1996) provides:

> *Death of Appellant during pendency of appeal.*
>
> When an appeal is pending before the Board of Veterans Appeals at the time of the appellant's death, the Board may complete its action on the issues properly before it without application from the survivors.

Department of Veterans Affairs (hereinafter "VA") Regulation 38 C.F.R. § 19.7 provides:

> *The decision.* (b) Content. The decision of

> the Board will be in writing and will set forth specifically the issue or issues under appellate consideration. Except with respect to issues remanded to the agency of original jurisdiction for further development of the case and appeals which are dismissed because the issue has been resolved by administrative action or because an appellant seeking nonmonetary benefits has died while the appeal was pending, . . .

STATEMENT OF THE CASE

In November 1993, Mr. Hudgins filed a Notice of Appeal from a September 10, 1993, Board of Veterans' Appeals (hereinafter "BVA") decision denying: (1) service connection for hearing loss of the right ear, a headache disorder, and a disability manifested by a loss of balance and a respiratory disorder including emphysema; (2) an increased (compensable) rating for hearing loss of the left ear with scarring of the tympanic membrane; and (3) an increased rating for tinnitus, currently evaluated as ten percent disabling.

On September 7, 1994, Mr. Hudgins filed arguments concerning three issues relating to his hearing impairment, as well as the issue of whether the BVA's denial of his claim for service connection for emphysema was clearly erroneous. Mr. Hudgins' claim of service connection for his emphysema was based upon incurring a smoking addiction, in service, at a time when the government included cigarettes in K-rations and encouraged soldiers to smoke to calm their nerves.

As a result of the arguments presented in the VA's opposition brief, an issue arose before the CVA concerning the standard of review of BVA decisions. Specifically, whether the mere

existence of a plausible basis to support a BVA decision is sufficient to demonstrate that the decision is not clearly erroneous when the evidence was in equipoise and the statutory benefit of the doubt should have been applied on behalf of the veteran, as required by statute. 38 U.S.C. § 3007(b) (1988). Upon the filing of Mr. Hudgins' reply brief, the CVA removed the appeal to a three judge panel on June 5, 1995. In July of 1995, counsel for Mr. Hudgins discovered that Mr. Hudgins had died and notified counsel for the VA of his death.

On August 8, 1995, the VA Secretary (hereinafter "Secretary") filed a motion to dismiss the appeal for lack of jurisdiction under *Landicho v. Brown*, 7 Vet. App. 42 (1994) and to stay the proceedings on the basis of Mr. Hudgins' death. Mrs. Hudgins, the surviving spouse, also filed a motion to stay the proceedings until October 10, 1995, in order to assess the proper course of action for continuing Mr. Hudgins' claim on her behalf.

In October, 1995, Mrs. Hudgins filed a motion to substitute herself for Mr. Hudgins in the pending appeal, and an opposition to the Secretary's motion to dismiss. The CVA granted the Secretary's motion and dismissed the appeal as moot on December 11, 1995, based on the mistaken conclusion that after Mr. Hudgins' death, there was no longer a "present, live controversy before the court," because a decision in the pending appeal "could [not] have an impact on the deceased appeallant. . . ." Mrs. Hudgins filed a Notice of Appeal to the Court of Appeals for the Federal Circuit (hereinafter "CAFC") on March 1, 1996. Rather than file an opposition brief, the Secretary requested the CAFC to stay the appeal. In an order dated July 15, 1996, the CAFC stayed the appeal pending final disposition in *Hesse v. Brown*. On December 17, 1996, the CAFC issued a decision in the consolidated cases of *Hesse* and *Zevalkink v. Brown*. (*See* Pet. App. 16a.) Upon motion by the

Secretary, the CAFC then summarily affirmed the decision of the CVA and dismissed Mr. Hudgins' appeal on the basis that "after a veteran's death, the claim is no longer one for disability compensation but rather one for accrued benefits."

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for a number of reasons: (1) to enjoin the CAFC from continuing to violate the separation of powers between the legislative and the judicial branch established by Article I, § 1 of the United States Constitution; (2) to resolve an effective split between two courts of appeals on an important fundamental question of jurisdiction concerning substitution in a veteran's appeal by a widow claiming accrued benefits when she stands in the exact position of the deceased veteran as to adjudication of the veteran's claim; and (3) to do — as Congress, and thereby the people of the United States, intended by enacting the remedial veteran's benefits legislation — justice to the veteran who, often at great personal cost, has served this country. The decision by the CAFC warrants review pursuant to Sup. Ct. R. 10.

The CAFC has overstepped its authority and violated Article I, § 1 of the Constitution by overturning Congress' decision and the choice of the people of the United States by rewriting the accrued benefits statute under the guise of legislative and constitutional interpretation. *Marbury v. Madison*, 5 U.S. 137 (1803); *Labine v. Vincent*, 401 U.S. 532, 91 S. Ct. 1017, 28 L. Ed. 2d 288 (1971). This Court has long held that it is not for courts to determine the wisdom of a benefits scheme nor approve or disapprove of legislation; rather that power belongs to Congress as representatives of the people of the United States. *Helvering v. Davis*, 301 U.S. 619, 644, 672, 57 S. Ct. 904, 910, 81 L. Ed. 1307; *United States v. Butler*, 297 U.S. 1, 56 S. Ct. 312 (1936).

Nevertheless, the Court of Appeals for the Federal Circuit has taken the accrued benefits statute, 38 U.S.C. § 5121, and inserted an added requirement that prior determinations of the deceased veteran's claim be vacated and the accrued benefits claimant begin anew on a blank slate by filing a separate action. This added requirement changes operation of the accrued benefits statute from merely substituting a new payee after a final determination as to what the deceased veteran was entitled to and was due and unpaid at the date of death, to mandating the commencement of a whole new adjudicatory proceeding to determine the amount due the veteran. The CAFC, in an effort to obscure this blatant rewriting of the statute, affirmed the CVA's unsupported circular rational proffered under the guise of "legislative interpretation".

Rather than even purporting to follow the principles laid down by this Court for interpreting statutes in light of legislative intent, the CAFC substituted its own judgment ignoring: (1) this Court's precedent; (2) the Secretary's prior regulation interpreting the legislative scheme; (3) a previous decision by the Court of Appeals for the Second Circuit on the exact same issue; (4) the plain language of the statute; (5) the intent of Congress; and (6) the remedial nature of the veteran's benefits legislation. The CAFC reasoned that there was no "jurisdiction" to allow Mrs. Hudgins to be substituted for her deceased husband because, although as the proper accrued benefits claimant she stands in the "exact position vis-a-vis adjudication of [her] deceased [husband's] underlying disability-compensation claim", her claim was separate from that of Mr. Hudgins. Simply put, the Court found a lack of jurisdiction, the express will of Congress notwithstanding.

Prior to the CAFC's interpretation of the statutes as they relate to substitution, the Secretary interpreted Congressional intent as requiring substitution when a survivor requested it.

The Secretary's position regarding Congress' intent is evident in the implementing regulations governing the agency. 38 C.F.R. §§ 20.1302 and 19.7(b). "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominate, well settled principle of federal law." *National R.R. Passengers Corp. v. Boston & Maine Corp.*, 113 S. Ct. 1394, 1401 (1992); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 111 S. Ct. 2524, 2534 (1991). The Secretary's interpretation was reasonable and is consistent with other regulations fostering efficiency and the promotion of the informal, nonadversarial system required by Congress. As such, the CAFC was required to defer to the Secretary's interpretation and permit substitution. However, as demonstrated in *Hudgins*, both the CAFC and the CVA ignored both these regulations and the statute and substituted their own judgment.

Furthermore, by specifically denying substitution of a survivor claiming accrued benefits, the courts have undercut the Secretary's implementing regulations. The CAFC's decisions regarding substitution have resulted in 38 C.F.R. § 20.1302 being overruled. *Smith v. Brown*, No. 95-898 (U.S. Vet. App. June 13, 1997) (relying on the CAFC decisions in *Hudgins* and *Zevalkink*.) This is impermissible; a court may not overrule an agency's interpretation when it is reasonable. *Aluminum Co. v. Central Lincoln People's Utility*, 467 U.S. 380 (1984).

The impropriety of the CAFC's rewriting of the statutes to preclude substitution by survivors claiming accrued benefits is further evidenced from the Second Circuit's reasoning in *Devaney v. United States*, 366 F.2d 807 (2d Cir. 1966). In *Devaney*, the Second Circuit expressly rejected the position adopted by the CAFC and interpreted the veterans' benefits statutes and regulations as allowing substitution by the survivor in order to pursue whatever rights remain after the veteran's death. *Devaney v. United States*, 366 F.2d at 808.

When the CAFC determined that there was no express statutory provision addressing survival of a veteran's claim for disability benefits, or that the statutes were ambiguous in this regard, the issue of survivorship should have been decided in accordance with the federal common law, rather than by substitution of its judgment for that of Congress with respect to the rights of a survivor. *E.g., Carlson v. Green*, 446 U.S. 14, 23 (1980); (Whether an action created by federal statute is extinguished by the death of a party is, in the absence of a statutory directive to the contrary, a question of substantive federal law.); *Mallick v. International Brotherhood of Electrical Workers*, 814 F.2d 674 (1987). Under the federal common law, if the action is remedial, it survives and substitution is permitted. *Schreiber v. Sharpless*, 110 U.S. 76 (1884). There is no question that the veterans' benefits statutes are remedial. In light of this fact, the CAFC should have determined that substitution was proper. It did not.

This decision by the CAFC demonstrates the danger of allowing courts to substitute their judgment for that of Congress. In one simple stroke, the CAFC has taken what was initially a statute designed to aide the veteran's family while conserving the limited resources of the courts and the VA and done just the opposite. The CAFC's quasi-legislative action prolongs the time for any decision by forcing the accrued benefits claimant to start the entire process over again. Resolution of the exact same legal and factual questions merely increases the burden created by cases already in the system.

The CAFC's decision is not supported by anything other than its own circular reasoning. It summarily prevents substitution in the scheme of veteran's benefits, at the BVA, the CVA and the CAFC. It violates the unambiguous intent of Congress, expressed in § 5121, to allow substitution. Congress expressed an intent to allow an accrued benefits claimant to

continue the veteran's claim so as to do justice to the veteran. This CAFC decision cannot be allowed to stand as law.

I.

THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND THE COURT OF VETERANS APPEALS VIOLATED THE UNITED STATES CONSTITUTION WHEN THEY REWROTE 38 U.S.C. § 5121, THE ACCRUED BENEFITS STATUTE.

Art. 1, § 1 of the United States Constitution ensures that the legislative and judicial roles are vested in separate governmental entities. *Marbury v. Madison*, 5 U.S. 137 (1803). Consistent with this scheme of representative governance, the role of the judiciary is limited to that of interpreting the enactments of the legislative branch in accordance with the Constitution and the intent of Congress, be it expressed or implied. By prohibiting substitution of the spouse of a deceased veteran into an appeal pending at the veteran's death, notwithstanding the spouse's statutory entitlement to a portion of what was due the veteran, the CAFC has violated this fundamental principle of our Constitution.

A. By Substituting Its Judgment The CAFC Ignored The Plain Meaning Of The Statutes Creating Veteran's Benefits Which Clearly Demonstrate That Congress Intended A Claim For Veteran's Benefits To Survive The Death Of The Veteran.

The question of whether a federal statutory claim survives the death of a party is essentially "a question of how to interpret the statute that provides for the action." *Mallick*, 816 F.2d at 676, citing *Cox v. Roth*, 348 U.S. 207, 210 (1955). When the claim at issue was created by an act of Congress, "the role of

the courts in deciding survivorship issue[s] is to effectuate the will of Congress as best they can." *Mallick*, 816 F.2d at 677. Even where the statutes are silent with regard to survivorship, a court must endeavor to determine the intent of Congress, for "the fact that Congress has failed to provide a clause on survivorship to accompany the statute granting the right of action does not necessarily mean that Congress intended that the action abate upon the death of a party." *Id.* To the contrary, "[t]he legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350-51 (1937). Accordingly, in assessing survivorship, the rule formulated by the court should be the one that "best serve[s] the goals which underlie the federal right of action itself." *Mallick*, 814 F.2d at 677.

Although the statutes creating veterans' benefits contain no provisions expressly stating that a veteran's claim survives after the veteran's death, 38 U.S.C. § 5121 provides indisputable evidence that Congress intended that the claim would survive to the extent the veteran was entitled to benefits for the time preceding his death. Indeed, by placing a limitation on the amount of the due and unpaid benefits ("damages") owed in 38 U.S.C. § 5121, Congress specifically recognized that the veteran's claim survives the veteran's death for the benefit of survivors. Continuation of a veteran's claim allows survivors to receive a portion of the benefits the veteran would have received had he survived a successful determination of his action.

Having expressly provided a statutory scheme allowing survivors to receive a portion of what the veteran would have recovered had his claim been found to be valid, Congress unquestionably intended that the veteran's claim survive his death. Where the language of a statute is clear "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470 (1917); *Connecticut Nat'l Bank*

v. Germain, 503 U.S. 249, 112 S. Ct. 1146 (1992) (The presumption is that Congress "says in a statute what it means and means in a statute what is says there.").

B. The CAFC's Prohibition On Substitution Conflicts With The Express Intent Of Congress That Veterans' Benefits Be Administered In An Informal Nonadversarial System.

Allowing substitution is consistent with the informal nonadversarial system Congress intended for the administration of veterans' benefits. Even if the accrued benefits provision were alone insufficient to establish Congress' intent that the action survive, permitting the action to survive and a survivor to substitute best serves the goals underlying the veterans' benefits statutes. The entire program of veterans' benefits is intended to provide for the veterans and their families out of a "desire to protect and do justice to the veteran, who has, often at great personal cost, served our country." *Karnas v. Derwinski*, 1 Vet. App. 308, 312-313 (1991); 38 C.F.R. § 3.4 (defining compensation as lost income). Consistent with this purpose, the veterans' benefits system is required to be administered in an informal and nonadversarial manner. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 323 (1985); *Nagler v. Derwinski*, 1 Vet. App. 297, 301 (1991). Permitting substitution in the present case is consistent with this mandate. *United States v. Oregon*, 366 U.S. 643, 647 (1961). "If the intent of Congress is clear, that is the end of the matter." *Brown v. Gardner*, 115 S. Ct. 552, 556 (1994); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Wasserman v. O.P.M.*, 21 F.3d 1090 (Fed. Cir. 1994).

The statutory provisions entitling a surviving spouse to receive a portion of the benefits that would have been due the veteran had he survived until his claim was resolved, place the survivor, substantively, in the shoes of the deceased veteran.

Zevalkink v. Brown, 102 F.3d 1236 (Fed. Cir. 1996). Mrs. Hudgin's ability to receive Mr. Hudgins' accrued benefits requires that the issues presented in Mr. Hudgins' appeal be decided in his favor. In fact, an accrued benefits claimant is limited to evidence already existing in the file. 38 U.S.C. § 5121(a). Accordingly, resolution of Mrs. Hudgins' accrued benefits claim requires a determination of the exact same issues, in view of the exact same evidence, presented in Mr. Hudgins' appeal. *See Peters v. Brown*, 7 Vet. App. 342 (1994) (The CVA held that the "accrued benefits" are those "which upon proper application, would have been owed to veteran at death; only the payee has been charged, and the amount is limited. . . .") To prevent Mrs. Hudgins from substituting and requiring the initiation of her own claim results in a rigid, formalistic, wasteful procedure that is the antithesis of Congress' intent.

Therefore, for accrued benefits to have any meaning, the CAFC should have allowed substitution of the surviving spouse. The fact that Congress has provided for a limitation on disability compensation payable to such a survivor, in no way indicates that Congress has prohibited or curtailed jurisdiction in terms of a case or controversy. Nor does it purport to require that the veteran's survivor engage in the meaningless exercise of reraising legal and factual issues already addressed over an extended period of years.

C. The CAFC Failed To Give Proper Deference To The Agency's Regulations Which Represented A Prior And Reasonable Interpretation Of Congressional Intent.

The regulations which detail the everyday runnings of the VA specifically state that upon the death of a veteran having an appeal pending at the BVA, the Board may issue its opinion

without a request from the surviving spouse.[1] Specifically, 38 C.F.R. § 20.1302 provides:

> *Death of Appellant during pendency of appeal.*
>
> When an appeal is pending before the Board of Veterans' Appeals at the time of the appellant's death. The Board may complete its action on the issues properly before it without application from the survivors.

Further, when monetary benefits are at issue, the regulations indicate that a written decision is required irrespective of the death of the claimant. For example, 38 C.F.R. § 19.7 provides:

> *The decision.* (b) Content. The decision of the Board WILL be in writing and WILL set forth specifically the issue or issues under appellate consideration. Except with respect to issues remanded to the agency of original jurisdiction for further development of the case and appeals which are dismissed because the issue has been resolve by administrative action or because an *appellant seeking nonmonetary benefits has died while the appeal was pending*, ... (emphasis added).

Section 20.1302 reflects the VA's recognition that a survivor claiming accrued benefits may step into the shoes of the deceased veteran both substantively and procedurally. Logically, by permitting the BVA to render a decision when the veteran has

1. 38 C.F.R § 20.1302 was invalidated by the CVA on June 13, 1997, based on the CAFC's decisions in *Hudgins* and *Zevalkink*. *Smith v. Brown*, No. 95-898 (CVA June 13, 1997). (*See* Pet. App. 33a).

died even "without application from the survivors," this section means that upon application by a survivor, the appeal continues. Such an interpretation is consistent with the apparent mandate of 38 C.F.R. § 19.7(b) that the *BVA is without discretion to dismiss an appeal when a claim involves monetary benefits* (accrued benefits are monetary benefits) even when the appellant dies during the pendency of the appeal. *Myers v. Derwinski*, 1 Vet. App. 127, 129 (1991); 38 U.S.C. § 4004(c).

By requiring a decision of the BVA upon application of the survivors and permitting a decision even without application of the survivors, the VA's regulations provide an informal and nonadversarial system of administering benefits in accordance with Congress' intent and in accordance with Walters. The continuation of a decision, after the death of a veteran, acknowledges that there may be a surviving spouse or other qualifying party, entitled to compensation without the burden of rearguing the very same issues in order to obtain accrued benefits. These regulations foster efficiency and conserve resources which, in an agency which handles hundreds of thousands of claims a year, cannot be overemphasized. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 309 (1985).

Thus, the VA's own regulations provide indisputable evidence that the decisions by the CAFC and the CVA in *Hesse*, *Zevalkink* and *Hudgins* were misinterpretations of the statute. *Spears v. Merit Systems Protection Board*, 766 F.2d 520, 523 (Fed. Cir. 1985); *Fawcus Mach. Co. v. United States*, 282 U.S. 375 (1931) (holding that regulations "are valid unless unreasonable or inconsistent with the statute.") The regulations in 38 C.F.R. are regulations enacted by, the Secretary charged with carrying out the intent of Congress in this matter. Despite the existence of these regulations, which specifically address the analogous situation, when a veteran dies during the

pendency of an appeal at the BVA, the CAFC and the CVA rewrote the statute, ignoring Congress' intent and prohibited substitution. This error breached the separation of powers mandated by the Constitution.

This Court has prohibited courts from overruling an agency's interpretation when that interpretation is a reasonable one. *National R.R. Passengers Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992); *Aluminum Co. of America, et al. v. Central Lincoln People's Utility District*, 467 U.S. 380 (1984). In *Aluminum*, the Court held that the Administrator's interpretation of an act is to be given deference, if his interpretation is a reasonable one, particularly in the absence of any statutory provision affirmatively indicating the contrary. *Id.* at 389. In the present case, there is definitely no statutory provision that affirmatively prohibits substitution or precludes deciding an appeal when the veteran dies.

The Secretary's regulations interpret the statute as allowing an appeal to continue despite the death of a veteran. These regulations were entitled to deference from the CAFC because the Secretary's interpretation is clearly reasonable. The Secretary's interpretation is consistent with the fact that Congress intended the survivor of a deceased veteran to step into his or her shoes with respect to accrued benefits. Congress' intent is unambiguous and at no point did Congress intimate that substitution should not be allowed. *Gardner v. Brown*, 5 F.3d 1456, 1463 (Fed. Cir. 1993), *affirmed*, __ U.S. __, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). The requirement that deference be paid to an agency's regulations applies equally to the Secretary of that agency. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Olson v. Brown*, 5 Vet. App. 430, 434 (1993). It is impermissible for the Secretary to ignore his own regulations, and to the extent the Secretary wishes to modify the regulations, the only recourse available is to amend them following the provisions set forth in the Administrative Procedure Act. 38 U.S.C. § 501.

The CAFC's ruling dismissing Mr. Hudgins' appeal and denying Mrs. Hudgins' substitution is in direct opposition to what should have happened had he died while his case was pending at the BVA. *See* 38 C.F.R. §§ 19.7 and 20.1302. Regulations 38 C.F.R. § 20.1302 and 19.7 represent "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly" and as such, is to be given great deference. *Aluminum Co. of America, et al. v. Central Lincoln People's Utility District*, 467 U.S. 380, 389 (1984); *Fawcus Mach. Co. v. United States*, *supra*; *United States v. Moore*, 95 U.S. 760, 763 (1877); *Brewster v. Cage*, 280 U.S. 327, 336 (1930). By failing to consider the agency's regulations, the CAFC failed to decide *Hudgins* in accordance with the law. *James v. Home Construction Co.*, 621 F.2d 727, 729 (5th Cir. 1980); *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 415 (7th Cir. 1980); *overruled on other grounds*, *Pridegon v. Gates Credit Union*, 683 F.2d 182 (7th Cir. 1982); *Pritchard v. Smith*, 289 F.2d 153, 154 (8th Cir. 1961); *Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733, 735 (2nd Cir. 1958); *Kirk v. Commissioner of Internal Revenue*, 179 F.2d 619, 621-22 (1st Cir. 1950); *Popplewell v. Stevenson*, 185 F.2d 111, 113 (10th Cir. 1950).

D. Even If The Intent Of Congress Is Unclear From The Statute, The CAFC's Decision Ignores The Remedial Nature Of The Veterans' Benefits Scheme, Contrary To The Common Law.

Even if the CAFC had determined that there was no statutory provision addressing survivorship of a veteran's claim for disability benefits, or that Congressional intent is unclear, the question of survivorship must be decided in accordance with the federal common law. *James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727, 730 (5th Cir. 1980); *Smith v.*

No. 2 Galesburg Crown Finance Corp., 615 F.2d 407, 414 (7th Cir. 1980); *Smith v. Dept. of Human Services, State of Oklahoma*, 876 F.2d 832 (10th Cir. 1989). Under the federal common law the general rule for determining survivorship turns on whether the action is remedial or punitive in nature. *Schreiber v. Sharpless*, 110 U.S. 76 (1884).

To determine whether an action is remedial or punitive, most courts consider the three factors set forth in *Murphy v. Household Finance Corp.*, 560 F.2d 209 (6th Cir. 1997). These include, in particular: (1) whether the purpose of the action was to redress individual wrongs or wrongs to the public; (2) whether the recovery ran to the individual or the public; and (3) whether the recovery was disproportionate to the harm suffered. *E.g.*, *James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727, 730 (5th Cir. 1980); *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407 (7th Cir. 1980); *Smith v. Dept. of Human Services, State of Oklahoma*, 876 F.2d 832, 835 (10th Cir. 1989). —

In assessing the first factor, it is necessary to consider the overall purpose of the statute. *James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d at 730. Although the CVA never addressed this in *Hudgins* or *Zevalkink*, the overall purpose of veterans' benefits legislation is to aid and do justice to the veteran. *Karnas v. Derwinski*, 1 Vet. App., 308 (1991); *see* 38 U.S.C. § 3007(a), (b) (1988) and 38 C.F.R. §§ 3.02, 3.103 (1990).

As for the remaining two factors, there is no question that the veterans' benefits statutes provide a recovery to an individual in an effort to redress wrongs or harm to the veteran rather than the public. 38 C.F.R. § 3.4 (1995). Further the entire process for administering veterans' claims is designed to carefully ensure that the veteran receives appropriate compensation for any

diminished earnings capacity resulting from service related injuries. In no way is the veteran provided compensation in excess of that reasonable for his injuries. The overall scheme is not designed to be a punishment to the government, but rather an aid and recognition to the veteran who has served his country often at great personal cost. There is no doubt that the veterans' benefits statutes are remedial rather than punitive. *Gardner v. Brown*, 5 F.3d 1456, 1463 (Fed. Cir. 1993), *affirmed*, __ U.S. __, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). Having decided that the statute is remedial, the inquiry ends. *Kirk v. Commissioner of Internal Revenue*, 179 F.2d 619, 621-22 (1st Cir. 1950). Substitution is proper because the action survives. *Smith v. No. 2 Galesburg*, 615 F.2d at 414-15.

Although the court professed to look at the overall statutory scheme regarding disability compensation, the court never considered whether its denial of substitution was consistent with the requirement that as remedial legislation it must be "construed broadly to the benefit of the veteran." *Brown v. Gardner*, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) (in construing a statute providing benefits to members of the armed services "interpretative doubt is to be resolved in the veteran's favor . . ."); *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 n.9 (1991); Citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). This is fundamental to any analysis of the overall statutory scheme and recognizes that "[t]he solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961).

Construing the statute to benefit Mrs. Hudgins and allowing her motion to substitute is the only outcome consistent with law. *E.g., Brown v. Gardner*, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). Denying Mrs. Hudgins' motion and forcing her to

begin the process all over again knowing that she could end up exactly the same place with the same unresolved issues pending in the present appeal defies reason as well as the law. In fact, it is difficult to imagine a more unjust manner of treating a spouse of a veteran than to tell her she must begin, anew a fight which her husband fought for over five years until his death. The issues presented in Mr. Hudgins' appeal survive and have yet to be decided. By definition, the appeal is not moot. *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *County of Los Angeles v. Davis, et al.*, 440 U.S. 625, 630 (1979). In *Hudgins* the CAFC affirmed CVA's focus on whether the original party was "[a] live" rather than the "controversy at issue". If this were the proper focus, then all the substitution statutes in federal district and appellate courts would be improper in light of the Art. III case and controversy requirements. Presumably, this is not the case. The same holds for Mrs. Hudgins' request to substitute. Mr. Hudgins' death did not end or settle, or in some way dispose of the issues so as to make it unnecessary for the court to decide the questions involved. To the contrary, the statute provides another party to whom those issues directly apply. The case is not moot.

The burden of demonstrating that a case is moot "is a heavy one." *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953). That burden has not been met in this case. The CAFC gave no reason for why it ignored the Secretary's regulations in this area; the CAFC never addressed the overall statutory scheme; the CAFC failed to read the separate provisions providing for accrued benefits and veterans benefits together, not only in terms of the overall statutory scheme, but also in terms of the substantive relationship between the two provisions; and the CAFC ignored the federal common law regarding substitution. The CAFC's analysis begins with the conclusion that the deceased veterans' cause of action terminates with his death. *Landicho*, 7 Vet. App. at 46. Such a conclusion

ignores the fact that a portion of his cause of action, the two year's worth of past benefits, expressly survives the death of the veteran because the statute provides those benefits to the survivors. *Howard v. Wilburn, et al.*, 166 F.2d 884, 885 (6th Cir. 1948). *See also Lincoln Printing Company v. Middle West Utilities Co.*, 74 F.2d 779 (7th Cir. 1935); *Burton v. Carey*, 82 F.2d 657 (9th Cir. 1936); *Cramer v. Phoenix Mutual Life Ins. Co.*, 91 F.2d 457 (10th Cir. 1938).

E. In Contrast To The CAFC, The Second Circuit Interpreted The Veteran's Benefits Statutes And Regulations To Permit Substitution Of A Surviving Spouse To Pursue Whatever Rights Remain After The Veteran's Death.

The fact that accrued benefits are set forth in a separate section of the statute and require the filing of a separate application is not sufficient to defeat jurisdiction, preclude substitution, or support a rewriting of the statute by the CAFC or the CVA. That very argument was previously advanced and soundly rejected by the Second Circuit in *Devaney v. United States*, 366 F.2d 807 (2nd Cir. 1966).

In *Devaney*, the veteran died while his appeal was pending. The government argued that Mr. Devaney's death rendered the appeal moot, because his widow was "required by law to file a new claim and to initiate a new administrative proceeding before the Veterans Administration." The Second Circuit rejected this contention, stating that:

> It would seem fatuous to us to require the widow to begin an entirely new proceeding to adjudicate the very same claim of negligence already before the Veterans Administration in the current proceeding. The *more sensible*, and without question the

> *more expeditious practice would be to allow Mrs. Devaney merely to take her late husband's place in the pending proceeding and to continue to pursue whatever rights remain after his death.*
>
> But the government argues that 38 U.S.C. § 3001 and 38 C.F.R. § 3.151 require that a second claim be filed. The language of the statute and regulation, however, do not support that contention. All that is required is the filing of "a specific claim," we see no reason why Mr. Devaney's original claim does not meet this requirement. The statute and regulation are silent as to whether refiling is required. And we decline to interpret these provisions as mandating such unduly burdensome and bureaucratic procedures. The government insists, however, that there is a distinction between the deceased's claim and that of his widow, for as a result of his death any possible recovery is limited by statute to one years accrued benefits.[2] 38 U.S.C. § 3021. We do not view this distinction as important; it is a mere ministerial detail which can be recognized by a simple amendment to Mr. Devaney's claim. (Emphasis added.)

Devaney, 366 F.2d at 808-09.

As the second circuit recognized in *Devaney*, an accrued benefits claim is substantively the same as the underlying claim

2. 38 U.S.C. § 5121 was amended 1996 to change "one" year to "two" years. Public Law 104-275, § 507.

of the deceased veteran. It makes little sense to require that an entirely new proceeding be initiated to obtain adjudication of the accrued benefits claim. To the extent that the accrued benefits claim is "different", the divergences are merely ministerial details that should not affect the ability of one seeking accrued benefits from substituting for a deceased veteran in a pending appeal. "Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." *In re Connaway*, 178 U.S. 421, 425 (1990), relying on, *Schreiber v. Sharpless*, 110 U.S. 76 (1884).

Similarly, the fact that a court must determine whether an accrued benefits claimant is a proper person to obtain the deceased veterans accrued benefits should not preclude substitution into a pending appeal. In any situation where substitution for a deceased party is attempted, the court can either make such a determination or remand for that limited purpose. The only difference in the case of a veteran's appeal for disability compensation is the fact that the statute provides criteria for determining the proper person to substitute. Certainly the mere fact that this determination must be made does not preclude substitution or deprive the forum of jurisdiction. This could easily be accomplished by a remand, to the BVA, after a determination of the merits of the underlying appeal or by staying the appeal pending a resolution of the issue by the BVA. Either procedure would shorten the time and resources required to resolve the claim for accrued benefits.

As the CAFC and CVA would have it, based upon nothing more than the mere possibility that the person claiming accrued benefits would not be the proper one, survivors are sent back to the starting line to begin the entire adjudicative and administrative action again. This ministerial requirement is extremely inefficient and unnecessarily wasteful of judicial resources and is clearly contrary to Congress' express intent

that the system of administering veterans benefits be informal and nonadversarial.

Despite the fact that accrued benefits and veterans benefits are set forth in separate statutory provisions and have slightly different procedural requirements, the CAFC should have allowed Mrs. Hudgins to substitute for her deceased husband in the pending appeal. Having recognized in *Zevalkink* that an accrued benefits claimant substantively takes the place of the deceased veteran, for the CAFC to reach a different conclusion with regard to procedure is unexplainable. Contrary to the Congressional mandate that veterans' benefits be administered in an informal and nonadversarial system, the CAFC's denial of Mrs. Hudgins' motion to substitute is, at best, based entirely on a rigid, formalistic interpretation of procedural requirements that foster no apparent substantive purpose. Clearly, the CAFC's decision elevates form over substance, in the extreme, which is impermissible in determining whether an action survives the death of a party. *In re*: *Connaway*, 178 U.S. 421, 425 (1990).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED APRIL 7, 1996

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-7025

WILLIAM HUDGINS, DECEASED, BY LILA HUDGINS, SURVIVING SPOUSE,

Appellant,

v.

JESSE BROWN, Secretary of Veterans Affairs,

Appellee.

JUDGMENT

Appeal from a judgment of the United States Court of Veterans Appeals in 93-1153 entered January 3, 1996, Per Curiam.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED: APRIL 7, 1997

s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: MAY 29, 1997

Appendix A

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-7025

WILLIAM H. HUDGINS,

Claimant-Appellant,

v.

JESSE BROWN, Secretary of Veterans Affairs,

Respondent-Appellee.

ON MOTION

Before RICH, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

RICH, *Circuit Judge*.

ORDER

The Secretary of Veterans Affairs moves for summary affirmance of the Court of Veterans Appeals' decision dismissing William H. Hudgins' appeal. Lila Hudgins, the surviving spouse of William H. Hudgins, opposes.*

* Hudgins opposes on the grounds that she has a right to argue in her (Cont'd)

Appendix A

BACKGROUND

In an order dated July 15, 1996, this court stayed the briefing schedule in this appeal pending the final disposition of *Hesse v. Brown,* Appeal No. 95-7012. On December 17, 1996, this court issued its decision in the consolidated cases of *Hesse* and *Zevalkink v. Brown,* Appeal No. 94-7101. *See Zevalkink v. Brown,* 102 F.3d 1236 (Fed. Cir. 1996).

In November 1993, William H. Hudgins appealed to the Court of Veterans Appeals after the Board of Veterans Appeals denied his claims both for service connection for various disorders and for increased compensation ratings concerning his hearing disorders. During the course of the veterans court proceedings, William H. Hudgins died. The Secretary moved to dismiss the appeal for lack of jurisdiction. In response, Lila Hudgins requested that she be substituted in the case for her husband.

On December 11, 1995, the Court of Veterans Appeals dismissed the appeal, determining that because there was no longer a justiciable case the court lacked the authority to substitute Lila Hudgins and allow the case to proceed. The veterans court determined that the case was moot and did not

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(Cont'd)
briefs, and then have the court decide, that the lead case recently decided by this court was wrong. While Hudgins is entitled to present this argument if she wishes (and she does so in her opposition, with her brief attached), she is being given the opportunity to present that argument here within the context of an opposition to the Secretary's motion for summary affirmance. Further, the court is deciding the merits of her appeal in the context of this order. Hudgins' argument, therefore, that she is being deprived of an opportunity to present her arguments to the court is without foundation.

meet the exception to the mootness doctrine under which cases involving issues capable of repetition yet evading review are permitted to proceed. The Court of Veterans Appeals, citing *Landicho v. Brown*, 7 Vet. App. 42 (1994), further determined that the case must be dismissed "[b]ecause no decision by this Court could have an impact on the deceased appellant." This appeal followed.

DISCUSSION

The Secretary argues that the Court of Veterans Appeals' decision should be summarily affirmed on the basis of our decision in *Zevalkink*. In that case, the Court of Veterans Appeals initially had substituted the surviving spouse for a veteran who died during an appeal involving the veteran's claim for disability benefits. Thereafter, the veterans court remanded the case to the Board. Following the Board's decision on remand, the surviving spouse appealed to the Court of Veterans Appeals. While the appeal was pending, the veterans court issued its decision in *Landicho*, holding that a surviving spouse who claims entitlement to accrued benefits under 38 U.S.C. § 5121 could not be substituted for her deceased husband in a proceeding concerning solely the husband's claim to disability benefits. The court further held that the surviving spouse lacked standing to prosecute the veteran's claim for service connection. On the basis of *Landicho*, the Court of Veterans Appeals in *Zevalkink* reversed the earlier course of allowing the veteran's case to proceed with the surviving spouse as a substituted party and dismissed the case. The surviving spouse appealed to this court.

We held in *Zevalkink* that the Court of Veterans Appeals correctly disallowed the substitution for the deceased veteran in connection with the prosecution of his claim for service

connection. This court stated that a spouse's accrued benefits claim is separate from a veteran's underlying claim to service connection. We concluded:

> Thus, after a veteran's death, the claim is no longer one for disability compensation but rather one for accrued benefits. The administrative and appellate procedures available to Mrs. Hesse on her separate claim ensure that she will not suffer injury by the Court of Veterans Appeals' decision to deny substitution. Any delay inherent in pursuing her own claim, when this procedure is established by statute, does not constitute the kind of actual or threatened injury that confers standing.

Zevalkink, 102 F.3d at 1244.

We agree with the Secretary that the Court of Veterans Appeals' decision dismissing William H. Hudgins' appeal should be summarily affirmed on the basis of *Zevalkink*. Summary disposition of a case "is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Here, the veterans court dismissed the appeal because the case no longer presented a live case or controversy and Lila Hudgins could not prosecute her husband's claim for service connection. The Court of Veterans Appeals' decision thus rests on the same issues decided by the court in *Zevalkink*. Further, we note that the veterans court vacated the Board's underlying decision concerning William H. Hudgins' claim for service connection

in order that any accrued benefits claim filed by Lila Hudgins will not be prejudiced by the Board's earlier decision.

Accordingly,

IT IS ORDERED THAT:

(1) The Secretary's motion for summary affirmance is granted.

(2) Each side shall bear its own costs.

APR 7 1997
Date

FOR THE COURT

s/ Giles S. Rich
Giles S. Rich
Circuit Judge

cc: Toni-Junell Herbert, Esq.
Dorann E. Banks, Esq.

APPENDIX B — JUDGMENT DATED JANUARY 3, 1996 AND ORDER DATED DECEMBER 11, 1995 OF THE UNITED STATES COURT OF VETERANS APPEALS

UNITED STATES COURT OF VETERANS APPEALS

No. 93-1153

WILLIAM H. HUDGINS,

APPELLANT,

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

JUDGMENT

The decision of the Court has been issued in this case. The time allowed by Rule 35 of the Court's Rules of Practice and Procedure for reconsideration or review of that decision has expired.

Judgment in accordance with the Court's decision is hereby entered this date pursuant to Rule 36.

DATED: JAN 3 1996

FOR THE COURT:

ROBERT F. COMEAU
Clerk of the Court

By: s/ Karen Meyers
Deputy Clerk

Appendix B

Copies to:

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km

Appendix B

UNITED STATES COURT OF VETERANS APPEALS

No. 93-1153

WILLS H. HUDGINS,

APPELLANT,

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before FARLEY, LANKY, and STEINBERG, *Judges.*

ORDER

In November 1993, the appellant, veteran William H. Hudgins, filed a Notice of Appeal from a September 10, 1993, Board of Veterans' Appeals (BVA or Board) decision denying (1) service connection for hearing loss of the right ear, a headache disorder, and a disability manifested by loss of balance and a respiratory disorder; (2) an increased (compensable) rating for hearing loss of the left ear with scarring of the tvmpanic membrane; and (3) an increased rating for tinnitus, currently evaluated as 10% disabling. Record (R.) at 4-12.

After both parties had filed briefs and the matter had been submitted to a panel, the Secretary, on August 8, 1995, filed a motion to dismiss the appeal for lack of jurisdiction under *Landicho v. Brown,* 7 Vet.App. 42 (1994), and to stay further proceedings, on the basis of the appellant's death in May 1995.

Appendix B

On August 10, 1995, a motion was filed by counsel for the deceased appellant to stay further proceedings until October 10, 1995, in light of the appellant's death and of his family's wish to "continue his claim". The Court issued an order granting a stay of this case until October 10, 1995. Subsequently, in October 1995, the appellant's counsel filed a motion to substitute the surviving spouse of the appellant as a party "to complete the appeal" and also filed an opposition to the Secretaries motion to dismiss. For the reasons that follow, the Court will grant the Secretaries motion and dismiss the appeal as moot.

In *Landicho,* the Court held that it lacked jurisdiction to allow the substitution of a party for a veteran who died while his or her appeal of a BVA-disallowed claim for disability compensation under chapter 11 of title 38, U.S. Code, was pending here on appeal, and dismissed the appeal because it had become moot by virtue of the death of the veteran appellant. *Landicho*, 7 Vet.App. at 44, 54. The Court held that the appropriate remedy under the circumstances is to vacate the BVA decision from which the appeal was taken (and cause the underlying regional office (RO) decision(s) to be vacated as well) and to dismiss the appeal. *Landicho,* 7 Vet. App. at 54. This was done to ensure that the BVA decision and the underlying RO decision(s) would have no preclusive effect in the adjudication of any accrued-benefits claims derived from the veteran's entitlement. *Ibid.*; *but cf: Yoma v. Brown,* __ Vet.App. __, No. 94-474 (Nov. 1, 1995) (per curiam order) (applying *Landicho,* dismissing appeal, and vacating Board decision but not directing that Board vacate RO decision).

In opposing the Secretary's motion to dismiss, the appellant's counsel contends, relying on *Karnas v. Derwinski,* 1 Vet.App. 308, 312-13 (1991), that the Court's decision in

Appendix B

Landicho and the amended Rule 43 of the Court's Rules of Practice and Procedure do not apply to this appeal because the appeal was pending at the Court at the time that decision was issued. In *Karnas*, the Court held that "where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant should . . . apply unless Congress provided otherwise or permitted the Secretary . . . to do otherwise and the Secretary did so". *Karnas*, 1 Vet.App. at 312-13. In *Camphor v. Brown*, the Court indicated that the rule announced in *Karnas* was applicable to changes in law brought about by opinions of this Court. *Camphor*, 5 Vet.App. 514, 518 (1993). As the appellant's counsel points out, the law as to whether a party may be substituted changed in September 1994 with the issuance of the Court's opinion in *Landicho* while this case was on appeal. The Board made its decision in the present case in September 1993.

Although the Board decision in the present case was issued prior to *Landicho*, the Court's jurisdictional holding in *Landicho* must be applied retroactively to cases pending on appeal in this Court. *See Hamilton v. Brown*, 4 Vet App. 528, 539 (1993) (en banc) (applying new jurisdictional rule to three cases pending before it), *aff'd*, 39 F.3d 1574 (Fed. Cir. 1994); *see also Johnson (Anne B.) v. Brown*, 7 Vet.App. 25, 26 (1994) (per curiam order) (discussing language in *Hamilton, supra*, as to retroactive application of changes in law and dismissing appeal for lack of jurisdiction). A "court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be prospective only". *Hamilton*, 4 Vet.App. at 539 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981)); *see also U.N.R Industries, Inc. v. United States*, 962 F.2d 1013, 1025 (Fed. Cir. 1992).

Appendix B

The appellant's counsel also argues that *Landicho* "is at odds with the overall statutory scheme and the policies behind veterans benefits as well as the purpose of this Court." Response (Resp.) at 2. The Court disagrees. In *Landicho,* the Court considered the statutory scheme and the specific provisions in chapters 11, 13, and 51 of title 38, U.S. Code, in concluding that such scheme "creates a chapter 11 disability compensation benefit that does not survive the eligible veteran's death." *Landicho, 7* Vet.App. at 47. The Court also considered the nature of (and the issues involved in) an accrued-benefits claim and of a veteran's underlying disability-compensation claim as well as the function of this Court not as an initial trier of facts but as a reviewer of fact determinations made by the Board. *Id* at 48. The Court is not persuaded by the arguments of the appellant's counsel proposing the overruling of *Landicho.*

The appellant's counsel contends that the question whether the appellant's emphysema was service connected is an issue capable of repetition yet evading review and that the case is thus, contrary to the holding of *Landicho,* not moot. Counsel asserts that "it is highly likely that many . . . veterans needing to appeal denial of service connection for emphysema will not live to obtain a decision on appeal . Resp. at 7. In the absence of a class action *(see Lefkowitz v. Derwinski,* 1 Vet.App. 439, 440 (1991) (en banc order) (denying petition to establish a class action procedure in this Court)), two conditions must be satisfied in order to qualify under the "capable of repetition yet evading review" exception to the mootness doctrine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Rife v. Brown,* 7 Vet.App. 340, 341 (1994) (quoting *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975)

(per curiam)). "Alternatively, as to the second condition, the petitioner must show 'the existence of an immediate governmental action or policy that has adversely affected and continues to affect a present interest.' " *Rife*, 7 Vet.App. at 341 (quoting *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974)).

As to the first requirement (that VA's denial of a claim for service connection for emphysema will evade review due to time restraints), there has been no showing that proper processing will not occur with respect to an RO's decision on a claim for service connection for emphysema or with respect to any appeal from such RO determinations. Also, there has been no showing that everyone — or, indeed, most everyone — who in the future is denied service connection for emphysema will be so short-lived as to die before having their case heard by this Court. Hence, the contention by the appellant's counsel that, in essence, future veterans may suffer a 5-year delay in the processing of this type of claim and that they will die before the claim is heard by the Court is mere conjecture that raises no more than a possibility that another claimant will be subjected to the same delay experienced by this veteran and thus will not have his or her claim heard by this Court. *Rife, supra; see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990); *Weinstein*, 423 U.S. at 149; *Cambridge Lewis Industries, Inc. v. United States*, 916 F.2d 1578, 1581-82 (Fed. Cir. 1990). Accordingly, the Court is not convinced that a denial of VA benefits for emphysema in the future will evade review in this Court in the course of a case or controversy as contemplated by Article III of the U.S. Constitution.

Even assuming arguendo that the first requirement for the application of the exception (evading review) were satisfied in

this case, it is difficult to see how either of the two alternatives for the second requirement could be satisfied. The first alternative requires that the "same complaining party would be subjected to the same action again". *Rife, supra.* In light of the death of the appellant, it is clear that he will not again be subjected to the alleged conduct — delay in the adjudication of a claim for service connection for emphysema *See Heles v. State of South Dakota,* 682 F. 2d 201, 202 (8th Cir. 1982) (remanding appeal to district court with directions to dismiss complaint as moot based on plaintiff's death and holding that "capable of repetition, but evading review" exception to rule of mootness was unavailing because the issue before the court, "though it will recur in someone's case, will not again arise with respect to [the plaintiff]"); *see also Weinstein* 423 U.S. at 148 (holding that second requirement not met where there was no demonstrated probability that respondent would again be among those who are subject to jurisdiction of parole system).

As to the second alternative, the Supreme Court in *Weinstein* concluded that the litigant who challenged the "government action or policy" in question must have a "present interest affected by that policy." *Weinstein,* 423 U.S. at 148. In so concluding, *Weinstein* noted that the posture of the parties in the case before it and in *Super Tire, supra,* were "quite different"; whereas the petitioner employer in *Super Tire* had continued to be adversely affected by the respondent state official's adherence to a policy of paving unemployment compensation benefits to strikers despite termination of the particular strike that had occasioned the lawsuit, the respondent in *Weinstein,* who had challenged a particular parole board's policy of denying him certain procedural rights in considering his eligibility for parole and had subsequently obtained parole and then a complete release from supervision, "no longer has any present interest

affected by that policy". *Weinstein, supra.* It is unclear to the Court how the deceased appellant has a present interest in the adjudication of claims by other claimants for chapter 11 benefits.

In view of the appellant's death, there is no longer a present, live controversy before the Court. Because no decision by this Court could have an impact on the deceased appellant and the circumstances of this appeal do not fall within any well-recognized exception to the mootness doctrine, the Court will dismiss the appeal in accordance with *Landicho* for the reasons set forth above.

On consideration of the foregoing, it is

ORDERED that the September 10, 1993, BVA decision is VACATED. This decision of the Court vacating the BVA decision has the legal effect of nullifying the underlying merits adjudication by the RO because this decision was subsumed in the BVA decision which the Court is vacating. *See Yoma, supra* (relying on *Robinette v. Brown,* 8 Vet.App. 69, 80 (1995)). Consequently, under *Landicho, supra,* any accrued-benefits claim by a survivor will have the same character (original claim or claim to reopen) as the claim that the veteran was pursuing at the time of his or her death, and the adjudication of that accrued-benefits claim will not be affected by the BVA or RO decisions that are being nullified by the Court's instant order vacating the BVA decision. It is further

ORDERED that this appeal is DISMISSED for lack of jurisdiction.

DATED: DEC 11 1995

PER CURIAM.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED DECEMBER 17, 1996

Ophel H. ZEVALKINK, Claimant-Appellant,

v.

Jesse BROWN, Secretary of Veterans Affairs, Respondent-Appellee

Eleanor M. HESSE, Claimant-Appellant,

v.

Jesse BROWN, Secretary of Veterans Affairs, Respondent-Appellee

Nos. 94-7101, 95-7012.

United States Court of Appeals,
Federal Circuit.

Dec. 17, 1996.

* * *

Before ARCHER, Chief Judge, RICH, and MICHEL, Circuit Judges.

ARCHER, Chief Judge.

The issue in No. 94-7101 is whether a claimant under 38 U.S.C. § 5121 (1994), for a deceased veteran's accrued benefits, must present new and material evidence to reopen the veteran's previously denied claim for benefits, and the issue in No. 957012

is whether such a claimant has standing to be substituted for a deceased veteran in the prosecution of the veteran's claim for benefits pending at the date of death before the Court of Veterans Appeals. These cases have been consolidated for purposes of disposition.

We affirm the holding of the Court of Veterans Appeals that new and material evidence is required to reopen a previously denied claim. We also affirm its decision refusing to substitute a claimant under § 5121 for the deceased veteran in a pending proceeding before the Court of Veterans Appeals.

BACKGROUND

A. In No. 94-7101, Mr. Zevalkink, a World War II veteran, had pursued a claim for service connection for a kidney disorder prior to his death. That claim was denied in a decision dated April 19, 1985, by the Board of Veterans' Appeals (BVA or Board).

After the death of her husband, Ophel H. Zevalkink (Mrs. Zevalkink), as-surviving spouse, filed a claim with the Los Angeles, California Regional Office (RO) of the now Department of Veterans Affairs (VA) for accrued benefits under 38 U.S.C. § 5121(a). Mrs. Zevalkink asserted that her husband had been entitled, at the time of his death, to an award of service connection for a kidney disorder.[1]

On August 2, 1989, the RO denied Mrs. Zevalkink's claim for accrued benefits on the basis that no new information had

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1. Certain other physical conditions were alleged to have been service connected but have been pursued and are not at issue here.

been submitted since the last hearing on Mr. Zevalkink's claim. The RO also stated that "[a] review of the evidence in file does not show [service connection] for any of the conditions on appeal, hence the prior denial [sic] are confirmed & continued."

Similarly, in a June 1991 decision, the BVA agreed with the RO's determination that no new and material evidence had been submitted since the 1985 denial of Mr. Zevalkink's claim for service connection for a kidney disorder and that, as a result, the claim could not be reopened. The Board stated that "[i]n order to now establish entitlement to service connection for kidney disability, there must be new evidence which is relevant and material and which establishes a basis for service connection for kidney disease."

Mrs. Zevalkink then appealed to the Court of Veterans Appeals which, in an in bane decision, affirmed the BVA. Zevalkink v. Brown, 6 Vet.App. 483, 488-89 (1994).[2] The court agreed with the BVA's determination that Mrs. Zevalkink had to show the presence in her husband's file of "new and material evidence" relating to the kidney disorder in order to pursue her claim for accrued benefits under § 5121 based on that condition.

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2. In order for the Court of Veterans Appeals to have jurisdiction over an appeal from the BVA, the claimant must have filed a notice of disagreement (NOD) with the RO with respect to that claim on or after November 18, 1988. Veterans' Judicial Review Act, Pub.L. No. 100-687, 301(a), 102 Stat. 4113 (1988), renumbered Pub.L. No. 102-40, § 402(d)(2), 105 Stat. 238 (1991) (see 38 U.S.C. § 7251 note); see also Hamilton v. Brown, 39 F.3d 1574, 1576 (1994). In this case, the Court of Veterans Appeals held that Mrs. Zevalkink's accrued benefits claim, while derivative of her deceased husband's disability claim, was a separate claim. Because Mrs. Zevalkink filed a NOD as to the RO's denial of this accrued benefits claim, the court determined, sua sponte, that it had jurisdiction in this case.

Id. at 489. The court reasoned that this conclusion was required to give meaning to all parts of the statute and to harmonize § 5121 with other statutory provisions such as 38 U.S.C. §§ 7104(b) and 5108 (1994), regarding the finality and reopening of VA benefit claims. Id. at 491.

Mrs. Zevalkink has appealed the Court of Veterans Appeals' determination that new and material evidence is required for a claimant under § 5121 to reopen a deceased veteran's claim.

B. In No. 95-7012, Eleanor M. Hesse's (Mrs. Hesse) claim for accrued benefits under § 5121 is based on the claim of her husband, Burt Hesse, for disability benefits for chronic obstructive pulmonary disease, which was pending before the Court of Veterans Appeals at the time of his death. Mr. Hesse first applied for benefits in 1976. The RO and the BVA denied his claim in decisions dated February 8, 1977 and November 21, 1977, respectively. Mr. Hesse attempted to reopen his claim at least eight times between 1978 and 1988, each time submitting additional documentation or testimony. In 1984, Mr. Hesse submitted and relied on a 1945 letter awarding him service connection and 10% compensation for a "lung condition." In all instances, however, the BVA refused to reopen Mr. Hesse's claim. The BVA's last decision relating to Mr. Hesse's attempts to reopen his claim was on April 17.1990. See Hesse v. Derwinski, 2 Vet.App. 359, 360-61 (1992) (detailing the procedural history of Mr. Hesse's claim for service connection).

Mr. Hesse sought review of this last BVA decision by the Court of Veterans Appeals.[3] While this appeal was pending, however, Mr. Hesse died. After his death, the Court of Veterans

3. The Court of Veterans Appeals was established in 1988 pursuant to the Veteran's Judicial Review Act, 301(a), renumbered § 402 (codified as amended at 38 U.S.C. §§ 7251-56, 7261-69, 7281-86, 7291-92, 7296-98).

Appeals, as was then its practice, see Landicho v. Brown, 7 Vet.App. 42, 47 (1994), substituted Mrs. Hesse as appellant in Mr. Hesse's appeal under Rule 43(a) of its Rules of Practice and Procedure.

With Mrs. Hesse pursuing her husband's claim, the Court of Veterans Appeals found, in a decision dated April 22, 1992, that the BVA had not adequately supported its findings and conclusions, and remanded the case to the BVA. Hesse, 2 Vet App. at 361. The court specifically asked the BVA to consider whether Mr. Hesse was entitled to benefits based on the 1945 letter or why that letter was not probative. On remand, the BVA again determined that no new evidence was present to justify reopening Mr. Hesse's claim. As to the 1945 letter, the BVA stated that its authenticity had not been proven under the best evidence rule and, therefore, refused to consider whether this letter established that the VA had granted Mr. Hesse service connection for a lung disorder rated at 10% disabling.

Mrs. Hesse again appealed to the Court of Veterans Appeals. At this time, however, the Court of Veterans Appeals had pending before it two cases: Zevalkink, discussed above, and Landicho v. Brown, 7 Vet.App. 42 (1994). In Landicho the Court of Veterans Appeals reconsidered its admittedly routine practice of permitting substitution under the court's Rule 43(a).

Rule 43(a)(2) provided:

> After Notice of Appeal. If a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, any person claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a), the

> personal representative of the deceased party's estate, or any other appropriate person may be substituted as a party on motion by such person or by any party. If no such person exists, any party may suggest the death on the record and proceedings will then be as the Court directs.

The court decided that a party claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a) could not be substituted for a deceased veteran in a pending proceeding involving the veteran's claim for disability compensation.[4] Landicho, 7 Vet.App. at 53-54.

The court reasoned that a veteran's disability compensation claim does not survive the veteran's death because under 38 U.S.C. § 5112(b) (1994), disability compensation is terminated on the last day of the month before the date of death. Id. at 47. As a result, the court concluded that no claim is pending at the time of the veteran's death as to which any party may be substituted. Id. The court pointed out that, although an accrued benefits claim may depend on the veteran's entitlement to unpaid disability compensation, it is a separate claim from the disability claim. Id.

The court then considered, given the separateness of the claims, whether for a claimant under § 5121 there was a continuing "case or controversy" and whether such a claimant would have standing to pursue the pending appeal. Id. at 48-49. The court determined that because there had been no

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4. The court did not address the propriety of substituting the other entities described in Rule 43(a), such as the personal representative of the veteran's estate, and we take no position on that issue in this appeal.

adjudication as to whether the person to be substituted for the deceased veteran would be qualified under § 5121 to receive accrued benefits, any decision the court might render on service connection would be purely hypothetical. Id. The court also determined that a § 5121 claimant would not be "adversely affected" by an outstanding BVA decision because the § 5121 claimant's action is separate and distinct from the deceased veteran's BVA proceeding. Id. at 53.

Thus, in Landicho, the Court of Veterans Appeals decided it did not have jurisdiction to decide the merits of a deceased veteran's disability claim after the veteran's death and that, as a result, an accrued benefits claimant could not be substituted in a proceeding on a deceased veteran's claim. The court then amended its Rule 43(a)(2) so chat accrued benefits claimants are not enticed to be substituted in the pending case of a deceased veteran.

Recognizing that both Zevalkink and Landicho were pertinent to and dispositive of Mrs. Hesse's case, the parties jointly requested that the Court of Veterans Appeals dismiss her appeal on the basis of those controlling cases. The Court of Veterans Appeals granted the dismissal, Hesse v. Brown, 7 Vet.App. 126 (1994), and Mrs. Hesse now appeals to this court.[5]

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5. Mrs. Hesse also presents arguments on appeal directed to the question of whether new and material evidence is required under § 5121, the same question raised in Mrs. Zevalkink's appeal. However, because of our holding on the question of whether she may be substituted for her husband in the pending case before the Court of Veterans Appeals, we will not consider the new and material evidence arguments by Mrs. Hesse except to the extent they are also disposed of in Mrs. Zevalkink's case.

Appendix C

DISCUSSION

This court's jurisdiction to review decisions of the Court of Veterans Appeals is limited. 38 U.S.C. § 7292 (1994). We are authorized to "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). Except to the extent that a constitutional issue is present, we may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case. 38 U.S.C. § 7292(d)(2); see Barnett v. Brown, 83 F.3d 1380, 1383 (Fed.Cir.1996). The Court of Veterans Appeals' interpretation of the requirements of § 5121 and other statutory provisions as well as the question of whether the statutory scheme permits substitution are, therefore, within our jurisdiction.

I. Jurisdiction

The Secretary challenges Mrs. Hesse's right to appeal in this case because "the order of the [Court of Veterans Appeals] dismissing her claim did not state Ms. Hesse sought to preserve any of her rights to appeal the dismissal" and, as a result, "there exists no case or controversy for Ms. Hesse to bring before the Court on appeal because Ms. Hesse voluntarily sought and obtained a dismissal of her appeal to the [Court of Veterans Appeals]." We find this argument quite surprising in view of the fact that the parties jointly stipulated to the dismissal because of the Board's decisions in Landicho and Zevalkink and stated that "[b]oth parties recognize that if the Court grants this Motion and enters judgment, Appellant will immediately appeal the judgment to the United States Court of Appeals for the Federal

Circuit and seek to consolidate her action with the pending Zevalkink appeal."

In its October 26, 1994 order dismissing Mrs. Hesse's action, the court specifically referenced the parties' joint motion for dismissal and appellant's concession that dismissal was required under the court's decisions in Zevalkink and Landicho. It is clear that the court dismissed Mrs. Hesse's case because of those decisions, which Mrs. Hesse intended to contest in an appeal to this court. Further, Mrs. Hesse thereafter filed and the court granted an unopposed motion to recall the mandate, which she noted had been issued prematurely in view of her appeal. Accordingly, we conclude that Mrs. Hesse preserved her right to appeal, and we find no jurisdictional infirmity.

II. New and Material Evidence

Section 5121 specifies that certain accrued benefits to which a veteran was entitled at the time of the veteran's death will be paid. Specifically, § 5121 provides:

> periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death . . . and due and unpaid for a period not to exceed one year, shall, upon the death of such individual be paid. . . .

38 U.S.C. § 5121(a). The statute then delineates the order of preference in paying out such benefits. See 38 U.S.C. § 5121(a)(1)-(5).

Appendix C

Under the statutory scheme, claims for benefits are first filed with the RO. The decision of the RO may be appealed to the BVA after filing a notice of disagreement (NOD) with the RO within one year of the decision. 38 U.S.C. § 7104; 38 CFR § 20.302(a). Once the BVA has issued a final decision, the statute provides in 38 U.S.C. §§ 7104 and 5108, that the BVA may not reconsider and allow a claim which it has previously disallowed unless new and material evidence is presented. Barnett v. Brown, 83 F.3d 1380, 1384 (Fed.Cir.1996). Specifically, § 7104 says that "[e]xcept as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." Section 5108 directs the Secretary to reopen a previously disallowed claim if new and material evidence is presented.

Appellants argue that the Court of Veterans Appeals' requirement that they produce new and material evidence in seeking accrued benefits under § 5121 contradicts the language of that section which provides that accrued benefits may be determined "based on evidence in the file at date of death." Appellants argue that their claims are separate from their husbands' claims, as the Court of Veterans Appeals recognized when it held that appellants must file their own NODs, and that those claims should be treated and analyzed separately based on-all evidence in the file. Appellants further contend that §§ 7104 and 5108 regarding the finality and the reopening of claims, while applicable to claims made by their deceased husbands, do not apply to them because their claims have never been finally decided.

We disagree. A claim for accrued benefits under § 5121, as the Court of Veterans Appeals correctly held, is a separate claim

from the veteran's claim for service connection because it is based on a separate statutory entitlement for which an application must be filed in order to receive benefits. See 38 U.S.C. § 5121(c) ("Applications for accrued benefits must be filed within one year after the date of death."). At the same time, however, an accrued benefits claim is derivative of the veteran's claim for service connection, i.e., the claimant's entitlement is based on the veteran's entitlement. Section 5121 provides direction on how to apply for accrued benefits which were "due and unpaid" to the veteran at the time of death and to whom the benefits are to be paid. Under § 5121, therefore, a claimant is only entitled to what was properly due the veteran at the time of death, but which was unpaid.

The language in § 5121 relied on by appellants to urge reversal bears this out. Contrary to appellants' argument, § 5121 does not entitle the claimant to a re-adjudication of the veteran's claim. Rather, it shows that the accrued benefits claim is derivative of the veteran's claim. Thus, the main thrust of the statute is to pay benefits that were "due and unpaid" to the veteran based on "existing ratings or decisions." 38 U.S.C. § 5121.

If the existing decisions were adverse, then no benefits are payable. While living, the veteran was bound by those existing decisions and could not have had them reconsidered absent new and material evidence. Sections 5108 and 7104 of title 38 expressly preclude the RO and BVA from considering a prior adjudicated claim unless new and material evidence is presented. See Barnett, 83 F.3d at 1384.

Appellants have presented no compelling argument, nor pointed to any statutory language, showing why existing ratings

and decisions should be reopened without such new and material evidence. Appellants argue, in effect, that the clause which states that accrued benefits may be "based on evidence in the file at date of death" allows them to reopen, and have a new adjudication of, any existing decision or rating. As shown, however, this would be inconsistent with the other provisions of § 5121 and with the central purpose of the statute which is to pay accrued benefits based on "existing ratings and decisions." Thus, we interpret the clause relied on by appellants as permitting the new adjudication of a prior claim only if there is new and material evidence in the file which has not previously been considered.

Appellants argue that this interpretation would violate the Due Process Clause of the U.S. Constitution because it binds them to decisions rendered through a procedure in which they were not allowed to participate. As discussed above, however, the accrued benefits claim is derivative of the veteran's claim and, by statute, the claimant takes the veteran's claims as they stand on the date of death, i.e., based on existing ratings and decisions and based on any new and material evidence in the file that has not previously been considered. Before the veteran's death, of course, the claimant has no claim and, thus, no process rights.

Finally, appellants argue that the VA's own regulation, 38 C.F.R. § 20.1106, requires the BVA to consider their claims without regard to any prior adjudication of the underlying claims. In this regard, they rely on the § 20.1106 provision that "issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime." The Secretary counters that the term "death benefits" in the regulation, as in 38 U.S.C. § 5310 (1994),

refers to death compensation in chapter 11, dependency and indemnity compensation in chapter 13, and death pension in chapter 15, all of title 38, which are continuing, periodic benefits based on the beneficiary's status as the veteran's spouse and does not refer to accrued benefits. Accrued benefits, by contrast, are sums owing to the veteran for prior periods, but unpaid at the time of death. Because accrued benefits are based on the veteran's own entitlement, the Secretary says they are not properly classified as "death" benefits.

The Court of Veterans Appeals correctly determined that the Secretary's interpretation of its regulation was not unreasonable. Although the VA regulations do not define the term "death benefits," that term is used in 38 U.S.C. § 5310. Section 5310 refers to the surviving spouse's entitlement "to death benefits under chapter 11, 13, or 15 of this title" (emphasis added) and provides how those benefits are to be paid. The accrued benefits statute, in contrast, appears in chapter 51 of title 38, entitled "Claims, Effective Dates, and Payments," and relates to the payment of benefits previously "due and unpaid." We see nothing inconsistent with the statute in the Secretary's interpretation of the regulatory use of the term "death benefits." Accrued benefits are amounts "due and unpaid" prior to the veteran's death and are not in the nature of death benefits of the type referred to in 38 U.S.C. § 5310.

III. Substitution

Appellant Hesse argues that the Court of Veterans Appeals, in refusing to allow her to continue prosecuting her husband's claim, has applied an unduly restrictive and formalistic approach to its jurisdiction and the requirement of a "case or controversy." This is especially true, according to Mrs. Hesse, because the

Appendix C

Court of Veterans Appeals is an Article I court, and the Article III justiciability limitations it adopted are not constitutionally required. Mrs. Hesse urges that the Court of Veterans Appeals has flexibility in determining what constitutes a justiciable controversy and should not have ruled the way it did.

Mrs. Hesse also contends that the court erred in determining that a claim for service connection does not survive a veteran's death. She argues that 38 U.S.C. § 5112(b)(1) merely provides for termination of "payments" to the veteran upon the veteran's death and does not affect the survival of the underlying claim for benefits. As to that underlying claim, Mrs. Hesse argues that it must survive since it is explicitly referred to in § 5121 establishing accrued benefits. Moreover, Mrs. Hesse asserts that she has standing to pursue her husband's claim because her claim is factually and procedurally dependent on her husband's claim and she, thus, would be injured if she were forced to start all over again.

The Secretary counters each of Mrs. Hesse's arguments. In particular, the Secretary contends that mere administrative delay is not sufficient injury to confer standing upon Mrs. Hesse and that the BVA decision, which gave rise to the appeal to the Court of Veterans Appeals, was rendered a nullity by her husband's death. Accordingly, Mrs. Hesse's claim can be decided following the normal administrative procedures without regard to that decision.

We conclude that the Court of Veterans Appeals did not err in determining not to allow Mrs. Hesse to be substituted in the prosecution of her husband's claim for service connection.

As a court established under Article I of the U.S.

Constitution, the Court of Veterans Appeals is not bound to the "case or controversy" requirement of Article III. However, it has decided, based on the same prudential considerations behind the "case or controversy" requirement, i.e., courts should only decide real and substantial controversies, not hypothetical claims, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937), that it would refrain from deciding cases that do not present an actual case or controversy. Mokal v. Derwinski, 1 Vet.App. 12, 13 (1990).

Generally, the requirement that a party have "standing" to appear before a court is intended to ensure that the court is deciding a real "case or controversy." See Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975). To have standing a party must have suffered some actual or threatened injury. Warth, 422 U.S. at 499, 95 S.Ct. at 2205. Under 38 U.S.C. § 7266(a) (1994), a party must be "adversely affected" by a decision of the Board in order to appeal to the Court of Veterans Appeals. The Court of Veterans Appeals considers this a "standing" requirement and that a party must, therefore, show some actual or threatened injury. Landicho, 7 Vet.App. at 49.

We agree with the Court of Veterans Appeals that Mrs. Hesse is not "adversely affected" by its refusal to permit substitution. As discussed above, an accrued benefits claim is separate from the veteran's underlying claim for service connection and disability compensation. Section 5121 specifies that an accrued benefits claimant must file an application for benefits within one year after the date of death of the veteran. VA regulations define claim or application as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit. " 38 C.F.R. § 3.1 (1996). The initial determination on a claim is

made by the agency of original jurisdiction, in this case the RO, 38 C.F.R. § 20.3(a) (1996), and not the Court of Veterans Appeals. After an initial decision, an appeal may only be taken after the issues have been framed by the filing of a NOD with the RO. See 38 U.S.C. § 7105. Indeed, an accrued benefits claimant must file a separate NOD with the RO to initiate appellate review. Payment on a veteran's disability compensation claim, on the other hand, terminates on the last day of the month before the veteran's death. 38 U.S.C. § 5112(b)(1). Thus, after a veteran's death, the claim is no longer one for disability compensation but rather one for accrued benefits. The administrative and appellate procedures available to Mrs. Hesse on her separate claim ensure that she will not suffer injury by the Court of Veterans Appeals' decision to deny substitution. Any delay inherent in pursuing her own claim, when this procedure is established by statute, does not constitute the kind of actual or threatened injury that confers standing. See Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90, 108 (D.C.Cir.1986) (stating that the time required to pursue an administrative remedy does not constitute irreparable injury such as would excuse a claimant from exhausting administrative remedies).

In this case, the Court of Veterans Appeals also determined that Mrs. Hesse must pursue her claim for accrued benefits separately from her husband's claim in part because her status as the appropriate claimant had not been adjudicated. Section 5121 lists a number of potential accrued benefits claimants such as the veteran's spouse, children, or parent or the person who bore the expense of burial. Thus, the determination of whether a party qualifies as an accrued benefits claimant necessarily involves fact finding. The Court of Veterans Appeals is not a trier of fact and is not in a position to make such factual

determination. While the Court of Veterans Appeals could perhaps remand the question of whether Mrs. Hesse qualifies as an accrued benefits claimant to the RO, we will not require the Court of Veterans Appeals to make such a limited referral. By following the established administrative course of filing a claim with the RO, both the question of Mrs. Hesse's status as the § 5121 claimant, as well as the merits of her claim, can be considered together. If that decision should be adverse, it can be appealed with a full record to the BVA and to the courts.

Thus, we cannot conclude that the Court of Veterans Appeals erred in refusing to substitute Mrs. Hesse in the prosecution of her husband's claim and in requiring Mrs. Hesse to file her own claim for accrued benefits.

CONCLUSION

We conclude that the Court of Veterans Appeals correctly determined that an accrued benefits claimant under 38 U.S.C. § 5121 must point to new and material evidence in the veteran's file to re-open the veteran's claim for benefits which has previously been finally decided. We therefore affirm the Court of Veterans Appeals' judgment in No. 94-7101. Moreover, because an accrued benefits claimant is required to file a separate claim for benefits, we affirm in No. 95-7012 the Court of Veterans Appeals' dismissal of Mrs. Hesse's case.

AFFIRMED.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF VETERANS APPEALS DECIDED JUNE 13, 1997

UNITED STATES COURT OF VETERANS APPEALS

No. 95-898

IRMA I. SMITH, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided JUN 13 1997)

Irma I. Smith, pro se.

Mary Lou Keener, General Counsel; *Ron Garvin,* Assistant General Counsel; *Adrienne Koerber,* Deputy Assistant General Counsel; and *Vito A. Clementi* were on the pleadings for the appellee.

Before NEBEKER, *Chief Judge,* and IVERS and STEINBERG, *Judges.*

STEINBERG, *Judge*: The pro se appellant, Irma I. Smith, who is the widow of World War II veteran Joseph G. Smith, appeals a May 24, 1995, Board of Veterans' Appeals (BVA or Board) decision made after the veteran's death that denied his claims for service connection for generalized fungus infection and for a rating greater than 10% for service-connected post-

traumatic stress disorder (PTSD). Record (R.) at 5-15. On November 20, 1996, the Secretary moved to dismiss the appeal for lack of jurisdiction based on the Court's opinion in *Landicho v. Brown*, 7 Vet. App. 42, 44 (1994). Although given the opportunity to do so, the appellant has not filed a pleading on the jurisdictional issues raised. For the reasons that follow, the Court will grant in part the Secretary's motion to dismiss and will vacate the Board decision.

I. Background

The veteran had active service in the U.S. Navy from June 1942 to December 1945. R. at 36. On October 7, 1991, he filed Notice of Disagreement (NOD) as to an August 8, 1991, Department of Veterans Affairs (VA) regional office (RO) decision granting service connection for PTSD and assigning a 10% disability rating, effective August 7, 1989. R. at 180, 193. On February 24, 1992, the veteran filed an NOD as to a January 2, 1992, VARO decision denying his September 1991 original claim for service connection for a generalized fungus infection. R. at 204, 212. On January 21, 1992, and April 7, 1993, respectively, the veteran filed a VA Form 9, Substantive Appeal to the BVA, for each claim. R. at 207, 283. On April 10, 1993, the veteran died. R. at 299.

On April 22, 1993, the appellant filed an application for dependency and indemnity compensation (DIC). R. at 286. A May 19, 1993, certification of appeal from the RO included the appellant's name as the "appellant" on the appeal for service connection for generalized fungus condition and for an increased rating for PTSD. R. at 305. A January 1994 written submission to the BVA from the American Legion, which had been the veteran's representative on these claims, "insist[ed] that the full

benefit of reasonable doubt be afforded the veteran's widow by the Board" and noted that it "would be fundamentally unfair for the Board . . . to deny this widow's claim for benefits for reasons not set forth in the statement of the case." Supplemental R. at 4.

In the May 24, 1995, BVA decision before us, the board denied the veteran's two disability-compensation claims, noting that his appeal with respect to the two RO decisions was pending at the time of his death and that, pursuant to 38 C.F.R. § 20.1302, "these claims are properly before the Board and the appellate process may be completed without application from the survivors." R. at 6. The Court also noted that the appellant had filed a claim for "death benefits, claiming service connection for the cause of the veteran's death, in April 1993"; that the "death claim was denied by rating decision of May 1993"; and that "this issue is not before the Board." R. at 6. On September 14, 1995, the appellant filed a Notice of Appeal (NOA) in this Court.

II. Analysis

A. Secretary's Contentions

The basis of the Secretary's motion to dismiss the appeal is the death of the veteran after appealing the denial of his claims to the Board but before the Board's May 24, 1995, adjudication of his claims. The Secretary asserts — in an apparent contradiction — that the Board's adjudication of the veteran's claims after receiving notice of his death does not alter the fact that his disability-compensation claims did not survive his death. The Secretary contends that the Board's May 1995 decision, as well as the underlying RO actions, are final and should not be vacated. The Secretary seeks dismissal of the instant appeal.

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On December 4, 1996, this court ordered the appellant to show cause why the Court should not dismiss the instant appeal under *Landicho, supra,* without also vacating the BVA decision. The Court also ordered the Secretary to file a response, including whether § 20.1302 is a viable regulation in light of *Landicho.* The appellant did not file a response to the Court's order. In the Secretary's response, he reiterates that the Court should dismiss the instant appeal and acknowledges that "in light of *Landicho,* 38 C.F.R. § 20.1302 appears to be no longer viable" and that he "would not oppose, through the Court's process, an invalidation of the said regulation." Response (Resp.) at 1. The Secretary does not specifically address the remedy (except to argue for dismissal of the appeal), if any, to be employed by the Court in light of the Board's proceeding to the adjudication of the merits of the deceased veteran's claims in this case.

B. Law on Jurisdiction

"[I]t is well-established judicial doctrine that any statutory tribunal must ensure that it has jurisdiction over each case *before* adjudicating the merits, that a potential jurisdictional defect may be raised by the court or tribunal, *sua sponte* or by any party at any stage in the proceedings, and, once apparent, must be adjudicated." *Barnett v. Brown,* 83 F.3d 1380, 1383 (Fed. Cir. 1996); *see also Johnson (Anne) v. Brown,* 7 Vet. App. 25, 27 (1994) (per curiam order); *Zevalkink v. Brown,* 6 Vet. App. 483, 488 (1994), *aff'd,* 102 F.3d 1236 (Fed. Cir. 1996) (consolidated with *Hesse v. Brown,* No. 95-7012). Accordingly, the Court always has jurisdiction to determine its jurisdiction over a case. *See Phillips v. Brown,* 10 Vet. App. 25, 30 (1997) (citing *Bell v. Hood,* 327 U.S. 678 (1946)); *Breslow v. Brown,* 5 Vet. App. 560, 562 (1993).

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This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Edmonds v. Brown*, 9 Vet. App. 159, 160 (1996) (citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988); *Prenzler v. Derwinski*, 928 F.2d 392, 393-94 (Fed. Cir. 1991); and *Skinner v. Derwinski*, 1 Vet. App. 2 (1990)). It has been firmly established that this Court has jurisdiction to review only those final BVA benefits decisions prior to which an NOD was filed on or after November 18, 1988, as to an underlying decision of an RO or other agency of original jurisdiction. *See* Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note); 38 U.S.C. § 7105. Furthermore, in order for the court to have jurisdiction over a final BVA decision, pursuant to 38 U.S.C. § 7266(a), there must be a timely-filed NOA. Section 7266(a)(1) provides: "In order to obtain review by the Court of Veterans Appeals of a final decision of the [BVA], a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title [38]." 38 U.S.C. § 7266(a); *see Landicho*, 7 Vet. App. at 49.

Thus, the three basic prerequisites for the court to have jurisdiction over an appeal are a final BVA decision, a post-November 17, 1988, NOD as to the VARO decision leading to that BVA decision, and a timely NOA. The Court in *Landicho* applied these basic principles in holding that the Court lacked jurisdiction to decide the merits of a veteran's disability-compensation claim after the death of the veteran. *See id.* at 47-48, 53-54. In *Landicho*, the Court held that it lacked jurisdiction to allow the substitution of a party for a veteran who had died while his or her appeal of a BVA-disallowed claim for disability

compensation under chapter 11 of title 38, U.S. Code, was pending here on appeal, and dismissed the appeal because it had become moot by virtue of the death of the veteran appellant. *Id.* at 44, 54. The Court concluded that the timely filing of the NOA by the veteran in this Court rendered nonfinal the BVA decision that had been the subject of the appeal and that, at the time of the veteran's death, the Board decision on appeal then became a nullity because it was in a state of nonfinality and could no longer serve any adjudicatory purpose because the veteran's claims had died with him. *Id.* at 52.

The Court held that the appropriate remedy under such circumstances was for the Court, even though it lacked jurisdiction over the substance of the appeal from the BVA decision, to vacate the BVA decision from which the appeal was taken (and cause the underlying VARO decision(s) to be vacated as well) and then to dismiss the appeal. *Id.* at 54; *see also Hudgins v. Brown*, 8 Vet. App. 365, 368 (1995) (per curiam order, *aff'd*, No. 96-7025 (Fed. Cir. Apr.-7, 1997 (order). This was done, opined the Court, to ensure that the BVA decision and the underlying RO decision(s) would have no preclusive effect in the adjudication of any accrued-benefits claims, derived from the veteran's entitlements, that may be brought by the veteran's survivor. *See Landicho, supra*; *see also Hudgins, supra.* Later, in *Yoma v. Brown*, 8 Vet. App. 298 (1995), the Court, relying on *Robinette v. Brown*, 8 Vet. App. 69, 80 (1995), refined the *Landicho* remedy by holding that vacating the board decision under such circumstances had the legal effect of nullifying the underlying RO decision, without the need for the court to direct the BVA to vacate that RO decision. *See also Hudgins, supra.* The U.S. Court of Appeals for the Federal Circuit has specifically expressed its approval of this Court's *Landicho* holding. *Zevalkink*, 102 F.3d at 1243-44.

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C. Board Decision a Nullity in the Instant Appeal

Just as the court in *Landicho* examined the status of the BVA decision in order to determine the Court's jurisdiction over the merits of the appeal, so the Court in the present case must consider the nature of the Board's May 1995 decision and the circumstances that obtained when it was entered. In the instant case, the veteran at the time of his death was appealing to the BVA the RO's denials of (1) an original claim for service connection for a fungus condition and (2) a claim for an increased rating for his service-connected PTSD. He had filed jurisdictionally-valid NODs as to the RO decisions that had denied each claim, had perfected his appeals to the Board, and had then died before the Board issued a decision on his two disability-compensation claims. R. at 193, 207, 212, 283, 299. After his death, the board, in May 1995, denied his claims rather than dismissing them as not surviving his death. Thereafter, the asserted spouse of the veteran filed the NOA as to the May 1995 Board decision denying the veteran's two claims.

Unlike in *Landicho,* the veteran here had not filed an NOA in this Court prior to his death. Although it is clear that the court does not have jurisdiction over the merits of the instant appeal and that normally such an appeal should be dismissed by virtue of the death of the veteran (*see Landicho,* 7 Vet. App. at 53-54), the Court, as part of its jurisdiction to decide whether it has jurisdiction, has not previously held that a BVA ruling on an appeal of a deceased claimant constitutes an erroneous assertion of jurisdiction by the Board. (The Court notes that no entity, such as the personal representative of the veteran's estate, was substituted in the veteran's stead prior to the issuance of the Board's decision, *see Zevalkink,* 102 F.3d at 1239 n.4.) For the reasons that follow, the Court holds that the May 1995 Board

decision was made without jurisdiction and was therefore not a final Board decision and that the appeal must be dismissed.

Immediately prior to his death, the veteran had filed an NOD as to each of two RO decisions that resulted in the May 1995 Board decision. As to the August 1991 RO decision granting service connection for PTSD, the veteran filed an NOD only as to the RO's failure to grant a rating greater than 10%. At the time of his death, the August 1991 RO decision (to that extent) and January 1992 RO decision had been rendered nonfinal by his timely filing of an NOD and substantive appeal. *See* 38 U.S.C. § 7105(c) ("[i]f no [NOD] is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulation not inconsistent with this title"); *cf. Holland v. Brown*, 9 Vet. App. 324, 328-29 (1996) (RO decision on remand from Board does not become final, and claim remains in appellate status, if any benefits sought on appeal with respect to appealed claim remain denied); *Tablazon v. Brown*, 8 Vet. App. 359, 361 (1995) (concluding that where appellant filed NOD as to RO decision but was not furnished with Statement of the Case, RO decision "never became final" and claim remained open); *Landicho*, 7 Vet. App. at 52 (holding that timely filing of NOA rendered nonfinal the BVA decision that was subject of appeal).

Similar to the state of nonfinality of the Board decisions at the time of the veterans' death in *Landicho*, the RO decisions in the present case, to the extent that they had been deprived of finality by virtue of the veteran's having filed timely NODs, had been rendered nullities by his death while those decisions were on appeal to the BVA. To the extent that the RO decisions

were rendered nullities, the Board lacked jurisdiction to render a decision on the veteran's claims in this case. The Board's having proceeded erroneously to adjudicate the veteran's claims without having jurisdiction to do so renders it decision a nullity. *Cf. Yoma, supra.* Accordingly, the court holds, as part of its determination that it lacks jurisdiction over this appeal, that the Board's May 1995 decision is not a final decision on the veteran's disability-compensation claims.

D. Remedy

As to the proper remedy to employ when an appeal has become moot — as is the case here by virtue of the death of the veteran while his case was on appeal to the Board — *Landicho* is controlling. *Landicho,* 7 Vet. App. at 54. The court there relied on *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950) and quoted the Supreme court opinion there as follows: "[The] established practice of the Court in dealing with a civil case from a court in the federal system which has become moot ***while on its way here*** or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." (Emphasis added.) The Supreme Court explained the purpose for vacating a judgment when a case has become moot: "[I]t is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear,* 340 U.S. at 41. *Munsingwear* thus calls for the vacatur of an underlying tribunal's decision that was moot when rendered. Because the veteran's appeal to the Board became moot at his death, thereby rendering the Board decision a nullity because it was issued without jurisdiction over the claims, the appropriate course for the Court is to vacate the *ultra vires* Board decision, just as the Court did in *Landicho,* 7 Vet. App. at 54-55 — with the legal

effect of nullifying, under *Yoma, supra,* the RO decisions to the extent they were appealed.

E. The Appellant's Accrued-Benefits Claim

The appellant in this case filed a timely April 1993 application for DIC, which included a claim for accrued benefits. *See* 38 U.S.C. §§ 5101(b) (claim for DIC deemed to include claim for accrued benefits); 5121(c) (application for accrued benefits must be made within one year after date of veteran's death); *see also* 38 C.F.R. § 3.1000(c) (1996); *Lathan v. Brown,* 7 Vet. App. 359, 368 (1995). An accrued benefit is a periodic payment "to which [the veteran] was entitled at death under existing ratings or decisions, or . . . based on evidence in the file at date of death and due and unpaid for a period not to exceed two years. . . ." 38 U.S.C. § 5121(a). An accrued-benefits claim asserting that a veteran's disorder was service connected incorporates any prior adjudications of the service-connection issue on claims brought by the veteran, because it derives from the veteran's service-connection claim. *See Martin (Mary Ann) v. Brown,* 7 Vet. App. 196, 198-99 (1994); *Zevalkink,* 6 Vet. App. at 492. Because the May 1995 Board decision and the underlying RO decisions (to the extent that they were appealed) are nullities, the appellant, in pursuing an accrued-benefits claim, will not be adversely affected by those decisions in a future adjudication of an accrued-benefits claim. *Landicho, supra.* This is because an "accrued-benefits claimant stands in the exact position vis-a-vis adjudication of the deceased veteran's underlying disability-compensation claim as did the veteran immediately prior to his or her death, including all evidentiary requirements then applicable to the veteran's underlying claim and all final rating decisions then in effect." *Landicho,* 7 Vet. App. at 52 (citing *Zevalkink,* 6 Vet. App. at 492-93).

Accordingly, the appellant's accrued-benefits claim derives from the veteran's original claims for service connection for a fungus condition and for a rating greater than 10% for PTSD, and will be based on the evidence in the file at the time of his death. *See Landicho* and *Zevalkink*, both *supra*; *see also Hudgins, supra* (accrued-benefits claim by survivor will have same character as claim veteran was pursuing at time of death, and adjudication of that accrued-benefits claim not affected by BVA or RO decision nullified by Court's order vacating BVA decision); *Hayes v. Brown*, 4 Vet. App. 353, 360-61 (1993) (holding that "evidence in the file at date of death" may include private hospital and examination reports submitted after date of death; permitting consideration of evidence deemed constructively in file at date of death); *Proscelle v. Derwinski*, 2 Vet. App. 629, 631-32 (1992) (claim for rating increase is an original claim even if denied previously). (The Court notes that there is no indication in the record that an accrued-benefits claim has been adjudicated by VA and that, although the May 1995 Board decision referred to a May 1993 RO decision adjudicating a DIC claim, that decision is not in the record on appeal.)

F. Invalidity of Regulations

Section 20.1302 of title 38 of the Code of Federal Regulation purports to give the BVA jurisdiction over appeals such as the one before the Court. That provision states: "When an appeal is pending before the Board of Veterans' Appeals at the time of the appellant's death, the Board may complete its action on the issues properly before it without application from the survivors." 38 C.F.R. § 20.1302 (1996). The effect of this regulation is to allow the claim to survive the claimant's death, and permit the Board to proceed to adjudicate the merits of the claim without a claimant. In *Landicho*, the Court considered the statutory scheme

and the specific provisions in chapters 11, 13, and 51 of title 38, U.S. Code, and concluded that such scheme "creates a chapter 11 disability[-]compensation benefit that does not survive the eligible veteran's death." *Landicho*, 7 Vet. App. at 47; *see Hudgins, supra.* That holding and the Court's holding today require the invalidation, to which the Secretary has acceded (Resp. at 1) of § 20.1302. Accordingly, pursuant to the Court's authority under 38 U.S.C. § 7261(a)(3)(C) and for the foregoing reasons and in light of applicable precedent, the Court holds that § 20.1302 is invalid because it is not "in accordance with law", specifically the provisions in chapters 11, 13, and 51 of title 38, U.S. Code, as interpreted by the Court in *Landicho* and upheld by the Federal Circuit in *Zevalkink*, 102 F.3d at 1243-44.

The procedure to be followed after the death of a claimant or appellant is also addressed in 38 C.F.R. § 20.611 (1996), which states in pertinent part:

> A recognized organization, attorney, agent, or person properly designated to represent a claimant or appellant will be recognized as the representative of his or her survivors for a period of one year following the death of the claimant or appellant. ***A representative may also continue to act with respect to any appeal pending upon the death of the claimant or appellant until such time as a final decision has been promulgated by the Board of Veterans' Appeals.***

(Emphasis added.) For the same reasons set forth above with

respect to § 20.1302 and on the same basis, the Court holds that so much of § 20.611 (the second sentence thereof) as permits an authorized representative or survivor of the veteran (other than a personal representative of the veteran's estate) to carry on an appeal of the veteran's disability-compensation claim pending at his or her death must also be, and is hereby, invalidated.

III. Conclusion

In view of the foregoing discussion and upon consideration of the parties' pleadings, the Court grants the Secretary's motion to dismiss. In the exercise of its jurisdiction to determine its jurisdiction, the Court holds that, because the appeal on the merits has become moot by virtue of the death of the veteran, the appellant cannot be substituted to carry on the appeal of the deceased veteran in this Court and that that appeal on the merits must be and is, therefore, dismissed for lack of jurisdiction. *See Hudgins* and *Landicho*, both *supra*. In the exercise of that same jurisdiction, the Court vacates the May 24, 1995, Board's *ultra vires* decision, which is a nullity because it was issued by the Board without jurisdiction over the appeal, *see Munsingwear, Hudgins*, and *Landicho*, all *supra*; under *Yoma, supra*, this vacatur has the legal effect of nullifying the January 1992 RO decision denying the claim for service connection for a fungus condition and the August 1991 RO decision to the extent that it denied a rating greater than 10% for service-connected PTSD, those decisions having been subsumed in the BVA decision. *See* 38 C.F.R. § 20.1104 (1996); *Hudgins, supra*.

VACATED; APPEAL DISMISSED.